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No. ~~1025~~ 70-45

In the Supreme Court of the United States

OCTOBER TERM, 1970

UNITED STATES OF AMERICA, APPELLANT

v.

DANIEL B. BREWSTER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The Motion to Dismiss or Affirm contests, *inter alia*, this Court's jurisdiction over this appeal pursuant to 18 U.S.C. 3731. This point calls for a brief response, in contrast to appellee's argument on the merits—which, at this stage of the case, simply reinforces our

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showing that the substantive question involved is both important and unsettled.

Appellee contends that the second paragraph of Section 3731 is not applicable to this case because the district court did not hold the bribery statute invalid in its entirety, but only that it could not be applied against members of Congress who accept bribes in exchange for legislative acts. But it is plain that the paragraph is invoked by a decision that a statute cannot constitutionally be applied to a class of cases. This Court so held last Term in *United States* v. *Knox*, 396 U.S. 77. In *Knox*, the district court had dismissed an indictment under 18 U.S.C. 1001 for misstatements in wagering tax forms, on grounds of self-incrimination, but did not, of course, purport to invalidate that statute as applied to other situations. This Court found jurisdiction under the second paragraph, because the district court's ruling "amount[ed] to a holding that § 1001, as applied to this class of cases, is constitutionally invalid". 396 U.S. at 79, note 2.

Since this Court's jurisdiction in this case is thus unassailable without regard to the "construction of the statute" and "motion in bar" questions in issue in *United States* v. *Weller*, No. 77, this Term, there is no

reason to defer action on our jurisdictional statement pending decision in *Weller*.[1]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

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[1] It is also plain that this Court has jurisdiction over the present appeal under the motion-in-bar clause of Section 3731 as strictly construed. Appellee's indictment was dismissed on the basis of the "new matter," presented by his plea of congressional privilege, that the district court found would forever bar appellee's prosecution; thus, this is a clearcut case of confession and avoidance, exactly as in *United States* v. *Blue*, 384 U.S. 251. This case does not touch the motion-in-bar question in *Weller*, where our argument against this Court's jurisdiction is based on the fact that the dismissal was based not on new matter but on a conclusion that the face of the record showed that there was no offense at all because of a defect in the underlying administrative proceeding. Our *Weller* brief concedes, consistent with the legislative history, that a claim of immunity is a motion in bar (p. 15).

Although the Criminal Appeals Act has been significantly amended by Title III of the Omnibus Crime Control Act of 1970, P.L. 91-644, approved January 2, 1971 (with the result that a future case of this nature would be appealable—like all criminal cases that the government can appeal—only to the court of appeals), that amendment specifically provides that it does not apply to cases "begun in any district court" before its effective date. The amendment is set forth, for the Court's information, in the Appendix to this memorandum.

APPENDIX

Omnibus Crime Control Act of 1970, PL 91-644, approved January 2, 1971.

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TITLE III—CRIMINAL APPEALS

SEC. 14. (a) Section 3731 of title 18, United States Code, is amended—

(1) by striking out the first eight paragraphs and inserting in lieu thereof the following:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court, dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

"An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.":

(2) by striking out the word "or" in the ninth paragraph and inserting in lieu thereof a comma, and inserting "or order" following the word "judgment" in the same paragraph;

(3) by striking out the last two paragraphs and inserting in lieu thereof a new paragraph as follows:

"The provisions of this section shall be liberally construed to effectuate its purposes."

(b) The amendments made by this section shall not apply with respect to any criminal case begun in any district court before the effective date of this section.

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